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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 540

AMERE GAS UTILITIES COMPANY, A CORPORATION,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA,
Appellee

UPON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JURISDICTIONAL STATEMENT

I

Statutory Provisions Sustaining Jurisdiction

This is an appeal under 28 U. S. C. § 1257(2), as amended (62 Stat. 929), from a final judgment of the Supreme Court of Appeals of West Virginia entered on the 9th day of November, 1953, which sustained the validity of a statute of the State (a final order of the Public Service Commission of West Virginia). There was necessarily drawn in question the validity of such statute on the ground of its being repugnant to the Constitution of the United States.

II

Nature of Case

On January 6, 1953, appellant, hereinafter referred to as Amere, filed with the Public Service Commission of West Virginia revised tariff sheets designed to increase its annual revenues about $500,462, which revenues would thereupon yield a net return of 4.8 per centum upon an agreed rate base of approximately $3,200,000. In accordance with the provisions of Chapter 24, Article 2 of the Official Code of West Virginia of 1931, as amended, the Commission held hearings upon the proposed tariffs during the months of February and March and, by order entered on March 26, 1953, authorized Amere to place into effect interim rates estimated to increase its annual revenues by only $183,099. By its final order now complained of, entered on August 31, 1953, the Commission concluded that the rates proposed by Amere were unjust and unreasonable and ordered the same stricken from the records. The Commission further found that the interim rates authorized by its said order of March 26th are just and reasonable and made them permanent.

In pursuance of Chapter 24, Article 5, Section 1 of the Official Code of West Virginia of 1931, as amended,[1] Amere

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[1] Chapter 24, Article 5, Section 1 of the Official Code of West Virginia of 1931, as amended, provides as follows:

"Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order. The applicant shall deliver a copy of such petition to the secretary of the commission before presenting the same to the court or the judge. The court or judge shall fix a time for the hearing on the application, but such hearing, unless by agreement of the parties, shall not be held sooner than five days after its presentation; and notice of the time and place of such hearing shall be forthwith delivered to the secretary of the commission, so that the commission may be represented at such hearing by one or more of its members or by counsel. If the court or the judge after such hearing be of the opinion that a suspending order should issue, the court or the judge may require bond, upon such conditions and

petitioned the Supreme Court of Appeals of West Virginia on September 14, 1953, for a suspension and judicial review of the Commission's final order. The petition alleged that the order is unlawful and arbitrary in that it violates the Constitution of the United States:

> (1) The order disallows, as an operating expense, the price paid by Amere to Atlantic Seaboard Corporation, which is engaged exclusively in the sale for resale of gas in interstate commerce, for gas necessarily purchased by it, even though such price is admittedly the only price which can lawfully be paid under Federal Power Commission tariffs; and such disallowance necessarily is in conflict with the "Commerce Clause" of the Constitution (Article I, Section 8, Cl. 3) and the Natural Gas Act (15 U. S. C. 717-717W);
>
> (2) The rates ordered by the Commission do not now and will not in the future yield sufficient revenue to meet operating expenses, exclusive of depreciation. The result of such order is that Amere is wholly deprived of any return upon its admitted rate base and its property is confiscated without due process of law in violation of the Fourteenth Amendment.

The Supreme Court of Appeals of West Virginia, by final judgment made and entered on the 9th day of November, 1953, denied Amere's petition for suspension and review "for the reason that the final order of the Public Service Commission of West Virginia, dated August 31, 1953, is found to be plainly right." The Court did not prepare a written opinion.

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in such penalty, and impose such terms and conditions upon the petitioner, as are just and reasonable. For such hearing the commission shall file with the clerk of said court all papers, documents, evidence and records or certified copies thereof as were before the commission at the hearing or investigation resulting in the entry of the order from which the petitioner appeals. The commission shall file with the court before the day fixed for the final hearing a written statement of its reasons for the entry of such order, and after arguments by counsel the court shall decide the matter in controversy as may seem to be just and right."

III

The State Statute Involved

Under repeated rulings of this Court, for jurisdictional purposes the final order of the Public Service Commission of West Virginia made on August 31, 1953, must be treated as an act of the state legislature. *The Atchison, Topeka and Santa Fe Railway Company* v. *Public Utilities Commission of California,* —— U. S. ——, No. 22, October Term, 1953, decided November 9, 1953; *Live Oak Water Users' Assoc.* v. *Railroad Commission,* 269 U. S. 354, 70 L. Ed. 305, 46 S. Ct. 149; *Ex Parte Williams,* 277 U. S. 267, 72 L. Ed. 877, 48 S. Ct. 523.

The order cancelled and struck from the tariff records of the Commission the revised tariff sheets filed by Amere on January 6, 1953, for the assigned reasons that such proposed rates "are not just and reasonable in that same would produce more revenue than is required to enable the Respondent (Amere) to pay its reasonable and necessary operating expenses, including taxes, and to provide for depreciation in and a return on its property used and useful in furnishing said gas service." The order further made permanent the rates authorized by the Commission in its interim order entered on March 26, 1953, which rates will produce increased annual revenue of $183,099, whereas those proposed by Amere would increase such annual revenue by $500,462. A copy of the final order of the Commission is attached as Appendix A.

By Report made a part of the final order by incorporation, the Commission submitted its analysis of the record and its reasons for entry of the order. A copy of such Report is also attached as Appendix B.

The Report of the Commission is lengthy and since its accuracy is challenged, no useful purpose would be served

by detailing its provisions at this point. Its pertinent provisions, however, are those stating the Commission's reasons for the disallowance of $358,807 as an operating expense, which sum represents the difference between the price actually paid by Amere to Atlantic for gas necessarily purchased under Federal Power Commission tariffs and the hypothetical costs of gas assumed by the order. It appears from the Report that although Amere actually pays approximately 62¢ per Mcf for gas purchased from Atlantic, the Commission, in determining Amere's cost of service, has re-priced such gas at 40¢ per Mcf.

The Report also adopts a hypothetical exchange arrangement governing gas purchased by both Amere and Atlantic from Columbian Carbon Company, a non-affiliated local producer. By such hypothesis, the Report has treated all of the Columbian Carbon gas as though it were purchased by Amere and the excess gas which Amere cannot utilize as though it were delivered to Atlantic during warmer weather in exchange for equal volumes to be delivered by Atlantic to Amere in colder weather, which assumed facts would accordingly reduce the amount of gas purchased by Amere from Atlantic.

IV

Dates of the Judgment Sought to Be Reviewed and upon Which Application for Appeal Is Presented

By order made the 9th day of November, 1953, the Supreme Court of Appeals of West Virginia entered the final judgment sought to be reviewed. Application for appeal therefrom to the Supreme Court of the United States is presented on the 10 day of December, 1953.

V

Stages in the Case in Which Federal Questions Were Raised

Amere raised the substantive Federal questions sought to be reviewed upon this appeal at the stages and in the manner as follows:

1. At the hearing upon the proposed rates held by the Public Service Commission of West Virginia on the 11th day of May, 1953, Amere objected to admission of evidence offered by the Commission's accountant, Heath, on the ground that such evidence was wholly in conflict with the tariffs filed with the Federal Power Commission governing the price which Amere admittedly must pay and which Atlantic must charge for gas. The objection was overruled (Transcript of Testimony, Vol. 2, pp. 322-323).

2. Upon completion of Heath's testimony, Amere moved to strike all of such evidence on the grounds that the witness unequivocally admitted that the Federal Power Commission is, under the Natural Gas Act, vested with exclusive jurisdiction to fix Atlantic's rates and that the Federal Power Commission rate fixes the price which Amere has paid in the past and must pay in the future, and that such rate was and is the only legal rate; and also on the grounds that the State Commission is without jurisdiction to tamper with or alter that rate; that the theories of the witness were entirely without factual evidence to support them; and that the disallowance of the cost of gas purchased from Atlantic, as an operating expense, is a confiscation of Amere's property without due process of law. The motion was overruled (Transcript of Testimony, Vol. 3, pp. 375-384). That at least one of the Commissioners apparently desired a judicial determination of the jurisdiction of the State Commission in the premises is evidenced by his statement that:

> "If this Commission has no jurisdiction at all over matters of that sort, it would seem to me, just speaking

for myself, that we might as well find out so that we won't take up the time of applicants or our own time or that of protestants in matters of this sort. Certainly we must have some jurisdiction. The Federal Power Commission didn't take it all." (Transcript of Testimony, Vol. 3, pp. 383-384).

3. In its reply brief [2] filed with the Commission on the 6th day of July, 1953, and a part of the record (Chapter 24, Article 5, Section 1 of the Official Code of West Virginia of 1931, as amended), Amere contended that the price paid by it to Atlantic is the only lawful price that can and must be paid as a matter of law and that to disallow such cost of gas, in determining the proper rates, is a taking of property without due process of law (Reply Brief of Applicant filed with the Public Service Commission, page 5). The Commission's final order of August 31, 1953, however, adopted the cost of gas adjustment theory sponsored by witness Heath, founded wholly upon hypothesis and speculation, and disallowed the Federal Power Commission rate (Appendices A and B).

4. By petition for suspension and review of the Commission's order, filed in the Supreme Court of Appeals of West Virginia on the 14th day of September, 1953, Amere, in its assignment of errors, squarely presented the Federal questions to the highest court of the State. The petition alleged that the order is arbitrary and unlawful and is in violation of the Constitution and Laws of the United States in the following particulars:

(a) The final order not only denies to Amere sufficient income to meet its operating expenses but also deprives it of any return whatever upon an agreed rate base of approximately $3,200,000 and therefore results in confiscation of its property.

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[2] The right to file an initial brief was waived to expedite the proceeding.

(b) The refusal of the Commission to allow, as an operating expense, the cost of gas purchased from Atlantic, at the Federal Power Commission filed rate, constitutes an invasion of Federal jurisdiction under the Natural Gas Act.

As shown by order entered on November 9, 1953, the State Court denied the prayer of the petition for suspension and review of the Commission's order for the reason that such order "is found to be plainly right."

It affirmatively appears from the record, therefore, that substantial Federal questions were presented for decision to the Supreme Court of Appeals of West Virginia. The final order of the Commission is predicated upon findings which are repugnant to the "Commerce Clause" and the due process provision of the Fourteenth Amendment of the Constitution. The constitutionality of such findings has been challenged at every opportunity and in every form.

Clearly, the Commission's re-pricing of gas sold by Atlantic to Amere constitutes an unlawful interference with interstate commerce, and rates which are not sufficient to yield a reasonable return on the value of the property used, at the time it is being used to render service, are unjust, unreasonable and confiscatory. *Bluefield W. W. & Improv. Co.* v. *Public Service Comm.*, 261 U. S. 679, 67 L. Ed. 1176, 43 S. Ct. 675; *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470, 82 L. Ed. 1469, 58 S. Ct. 990. In view of the errors in the final order of the Commission, as assigned in Amere's petition for suspension and review, and the judgment of the Supreme Court of Appeals of West Virginia that the order was "plainly right", the decision of the Court necessarily affirmed the validity of the order on constitutional grounds. Although no particular form of words need be used before the Federal questions may be said to be involved (*New York Ex Rel. Bryant* v. *Zimmerman*, 278 U. S. 63, 73 L. Ed. 184, 49 S. Ct. 61), the inescapable

effect of the decision was to deny the alleged invalidity of the order. There was not and could not be any other ground upon which to rest the decision. Adjudication of the Federal questions was essential to a determination of the case.

In sustaining the Commission's order by denying the petition for suspension and review because such order was "plainly right", the State Court upheld the validity of the legislative enactment after it had been challenged on constitutional grounds. *The Atchison, Topeka and Santa Fe Railway Co.* v. *Public Utilities Commission,* ——— U. S. ———, October Term, 1953, decided November 9, 1953. Therefore, appeal to the Supreme Court of the United States properly lies. *Ex Parte Williams,* 277 U. S. 267, 72 L. Ed. 877, 48 S. Ct. 523; *King Mfg. Co.* v. *Augusta,* 277 U. S. 100, 72 L. Ed. 801, 48 S. Ct. 489; *Live Oak Water Users' Assoc.* v. *Railroad Comm.,* 269 U. S. 354, 70 L. Ed. 305, 46 S. Ct. 149; *Northern P. R. Co.* v. *Department of Public Works,* 268 U. S. 39, 69 L. Ed. 837, 45 S. Ct. 412; *Kansas City S. R. Co.* v. *Road Improv. District,* 256 U. S. 658, 65 L. Ed. 1151, 41 S. Ct. 604; *Lake Erie & W. R. Co.* v. *State P. U. Comm.,* 249 U. S. 422, 63 L. Ed. 684, 39 S. Ct. 345.

VI

The Federal Questions Involved Are Substantial

This Court has consistently upheld the integrity of interstate commerce against unlawful interference by the states, and likewise, since its adoption, the Fourteenth Amendment has constituted a bulwark against the taking of property without due process of law. In this case, the statute complained of (the order of the Commission) demonstrates clearly the substantial invasion of rights protected by the Federal Constitution.

The Commission's attack upon the Federal Power Commission rates is clearly evidenced by the following quotations from the Report:

> "Amere is now required to pay approximately 62¢ per Mcf. for all gas [1,367,769 Mcf. during the test year 1952, p. 4] purchased from Atlantic." (Appendix B, p. 21.)
>
> "Obviously, the Federal Power Commission approved rates of Atlantic give only token consideration to the fact that Atlantic's West Virginia and Kentucky customers are much nearer to the source of supply than its Virginia and Maryland customers." (Appendix B, pp. 22-23)

In addition, the Commission refers to the "inequities" of the price Amere is required to pay Atlantic for gas, and even adopts the opinion of its witness as to Atlantic's cost of service by stating "40¢ per Mcf is more than the cost of the service to Atlantic" (Appendix B, pp. 22). Moreover, the Commission, in its Statement of Reasons filed with the State Court, as required by the statute, characterizes the Federal Power Commission tariffs as "unreasonable" and "artificially inflated" and admits it disregarded those tariffs by asserting:

> "The Commission categorically denies that by its order it tampered with a tariff approved by the Federal Power Commission and within the jurisdiction of that body, but the Commission admits that it did disregard the unreasonable operating costs shown upon the books of Amere for gas purchased from Atlantic at the artificially inflated price of 60¢ per Mcf and substituted exchange gas and an allowance of 40¢ per Mcf * * *." (Statement of Commission filed with Supreme Court of Appeals of West Virginia, p. 4).

Thus the Commission says it did not tamper with a tariff within the jurisdiction of the Federal Power Commission;

nevertheless, in the same breath it admits that it did just that by re-pricing gas in disregard thereof.

Having concluded to re-price the gas contrary to Federal Power Commission rates, the Commission went further and assumed a hypothetical exchange arrangement between Amere and Atlantic which also conflicts with the Federal jurisdiction and two other Federal Power Commission Rate Schedules of record in this case.

These Schedules govern (a) the exchange of gas purchased by Amere from local producers other than Columbia Carbon Company, a non-affiliated producer, and (b) the transportation by Amere of gas purchased by Atlantic from Carbon. The Commission not only ignored such Schedules but also misstated and confused the facts concerning the purchase by Amere and Atlantic of the Carbon gas, all as fully appears of record.

Since Amere's transportation of gas purchased by Atlantic from Carbon, and its exchange of other locally produced gas with Atlantic for equal volumes of gas from Atlantic's interstate transmission pipe line, are governed by Federal Power Commission Rate Schedules, neither Atlantic nor Amere can deviate therefrom without Federal Power Commission approval.

This Court has held that the State Commission cannot compel a natural gas company to do an act which requires the prior approval of the Federal Power Commission under the Natural Gas Act. *Illinois Natural Gas Co.* v. *Central Illinois Public Service Comm.*, 314 U. S. 498, 86 L. Ed. 371, 62 S. Ct. 384. Moreover, in this case the Federal Power Commission Schedules already in force govern this subject matter and the State Commission's hypothetical arrangement is in conflict therewith.

The language of the order and the record plainly show that the Commission substantially invaded the Federal

jurisdiction and attempted to do indirectly what it admittedly could not do directly. The State Court affirmed this usurpation despite many clear-cut holdings of this Court lucidly defining the powers and jurisdiction of the Federal Power Commission. The power to fix rates for natural gas transported and sold in interstate commerce has been intrusted solely to the Federal Power Commission. *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 87 L. Ed. 396, 63 S. Ct. 369; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 95 L. Ed. 912; 71 S. Ct. 692; *Panhandle E. Pipe Line Co.* v. *Public Service Comm.*, 322 U. S. 507, 92 L. Ed. 128, 68 S. Ct. 190.

Although the Commission says it was "reluctant to accept adjustments that are not based upon actual operation" (Appendix B, p. 23), its reluctance was more apparent than real, since it proceeded to do just that. Having determined to ignore the facts it embraced fanciful hypotheses to fill the vacuum. It disallowed more than 71% of the additional revenue required by Amere to meet essential operating expenses and to earn a return of less than 5% on its net investment. The Commission speculated that "if" Amere purchased gas from United Fuel Gas Company, and "if" it made an arrangement for the transportation thereof by Atlantic, both necessarily dependent upon an additional "if" (i. e., that the Federal Power Commission would authorize Atlantic to transport such gas), a lower cost to Amere might result. There was no cost of service or other evidence in support of the Commission's naked speculation.

It therefore affirmatively appears from the record that the Commission unlawfully interfered with interstate commerce and the jurisdiction of the Federal Power Commission by re-pricing the gas necessarily purchased by Amere from Atlantic and, in violation of the Fourteenth Amend-

ment, arbitrarily fixed such price on the basis of its bald assumptions rather than evidence.

This Court has held the action of a Commission to be "wholly arbitrary" in striking off 2% of the 9% claimed by a gas company as a loss resulting from leakage where there was no evidence supporting such a minor adjustment. *West Ohio Gas Company* v. *Public Utilities Commission of Ohio,* 294 U. S. 63, 79 L. Ed. 761. In the instant case, the adjustment made by the Commission is of catastrophic proportions, and is not only "wholly arbitarary" but confiscatory.

As so aptly stated in *Mississippi River Fuel Corp.* v. *Federal Power Commission,* C. C. A., D. C. 163 F. 2d 433, 437:

> "Expenses (using that term in its broad sense to include not only operating expenses but depreciation and taxes) are facts. They are to be ascertained, not created, by the regulatory authorities. If properly incurred, they must be allowed as part of the composition of the rates. Otherwise, the so-called allowance of a return upon the investment, being an amount over and above expenses, would be a farce."

"It is not theory but the impact of the rate order which counts." *Federal Power Commission* v. *Hope Natural Gas Company,* 320 U. S. 591, 88 L. Ed. 333, 64 S. Ct. 281. The uncontroverted and indisputable impact of the rate order in this case, under actually existing circumstances, is to deprive Amere of sufficient annual revenue to meet operating expenses, exclusive of depreciation, and to deny to Amere any return whatever upon its rate base, which is admittedly in excess of $3,200,000. The resulting operating deficit is of such magnitude that it will soon destroy the company. Obviously, there is no return "sufficient to assure confidence in the financial integrity of the enterprise, so as

to maintain its credit and to attract capital." *Federal Power Commission* v. *Hope Natural Gas Co., supra.*

"Present confiscation is not atoned for by merely holding out the hope of a better life to come." *West Ohio Gas Co.* v. *Public Utilities Comm.*, 294 U. S. 79, 79 L. Ed. 773, 55 S. Ct. 324; *Missouri ex rel. Southwestern Bell Teleph. Co.* v. *Public Service Commission*, 262 U. S. 276, 288, 67 L. Ed. 981, 985, 43 S. Ct. 544.

VII

Conclusion

It is, therefore, respectfully submitted that the order of the Public Service Commission, the validity of which was sustained by the Supreme Court of Appeals of West Virginia, contravenes the Constitution and Laws of the United States. The cases relied upon are believed to sustain this appeal under § 1257(2) of Title 28 U. S. C., as amended.

Charles C. Wise,
Tilford A. Jones,
Edward S. Pinney,
E. Glenn Robinson,
Counsel for Appellant.

APPENDIX A

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 31st day of August, A. D. 1953.

Case No. 3888

AMERE GAS UTILITIES COMPANY, a Corporation, Investigation and Suspension of Rates and Charges

This proceeding came on to be heard this 31st day of August, 1953, upon the revised tariff sheets offered for filing by Amere Gas Utilities Company, a corporation, hereinafter called "Respondent," designated Third Revision of Original Sheet No. 8 to its Tariff P. S. C. W. Va. No. 2 and Second Revision of Original Sheet No. 8-A to said tariff, which said new revisions cancel Second Revision and First Revision, respectively, of said sheets in said tariff, and state increased rates and charges for furnishing natural gas service to its customers in West Virginia, except sales to Bluefield Gas Company; upon the order entered herein on January 8, 1953, setting said matter down for hearing and suspending the use of the aforesaid rates and charges until June 10, 1953, unless otherwise ordered by the Commission; upon proof of the giving of notice as required by said last mentioned order; upon the protests noted in the hereinafter mentioned report; upon the evidence adduced at hearings held herein on February 24, May 11, and June 2, 1953; upon the order entered herein on March 26, 1953, authorizing the Respondent to put into effect temporary increases in its rates and charges, effective April 1, 1953; upon the order entered herein on June 3, 1953, further suspending the proposed rates and charges until December 10, 1953, unless otherwise ordered by the Commission; upon the briefs filed on behalf of the Respondent and the protestants; and upon the report of the Commission made this day and now filed herein and made a part hereof.

Upon consideration whereof and for the reasons set out

in the aforesaid report, the Commission is of opinion and finds that the rates and charges stated in the aforementioned revised tariff sheets are not just and reasonable in that same would produce more revenue than is required to enable the Respondent to pay its reasonable and necessary operating expenses, including taxes, and to provide for depreciation in and a return on its property used and useful in furnishing said gas service; that said tariff sheets should be canceled and stricken from the tariff files of the Commission; that the interim rates and charges the Respondent now has in effect, as authorized by the order entered herein on March 26, 1953, are just and reasonable and, if properly applied, should produce sufficient revenue for the above mentioned purposes; and that said interim rates now in effect should be made permanent.

It is, therefore, ordered that the revised tariff sheets offered for filing by Amere Gas Utilities Company, a corporation, designated Third Revision of Original Sheet No. 8 to its Tariff P. S. C. W. Va. No. 2 and Second Revision of Original Sheet No. 8-A to said tariff, be, and they hereby are, canceled and stricken from the tariff files of the Commission.

It is further ordered that the Respondent, Amere Gas Utilities Company, a corporation, be, and it hereby is, permitted and authorized to continue in effect on a permanent basis the rates and charges authorized in the order entered herein on March 26, 1953, for all gas furnished by it in West Virginia, except for gas furnished Bluefield Gas Company.

A Copy. Teste:

N. F. Wright, Jr.,
Secretary.

APPENDIX B

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, CHARLESTON

Case No. 3888

AMERE GAS UTILITIES COMPANY, a Corporation, Investigation and Suspension of Rates and Charges

APPEARANCES:

Charles C. Wise, A. M. Calland, and *Richard A. Rosan,* for Respondent;
Benjamin D. Tissue for the City of Beckley, protestant;
Fletcher W. Mann for the Independent Citizens Committee of the City of Beckley, protestant;
Ira M. Smith for the City of Princeton, protestant;
George L. Ballard for the Town of Sophia, protestant;
Ray Toler for the City of Mullens and the Chamber of Commerce of Mullens, protestants.

REPORT OF THE COMMISSION, *August 31, 1953*

BY THE COMMISSION:

This proceeding is before the Commission upon the revised tariff sheets offered for filing by Amere Gas Utilities Company, a corporation, hereinafter called "Respondent" or "Amere," which sheets were designated Third Revision of Original Sheet No. 8 to its Tariff P. S. C. W. Va. No. 2 and Second Revision of Original Sheet No. 8-A to said tariff, stating increased rates and charges for furnishing natural gas service to its customers in West Virginia, except sales to Bluefield Gas Company, which rates were designed to increase Respondent's annual revenue approximately $500,462, based on its 1952 sales. The above mentioned revised tariff sheets were offered for filing on January 6, 1953, to become effective February 15, 1953. On January 8, 1953, the Commission entered an order suspending the use of the proposed increased rates until June 10, 1953, unless otherwise ordered by the Commission, and set the matter for hearing on February 24, 1953. At the hearing

held on the last mentioned date, protests were made on behalf of the cities and organizations mentioned above, and numerous written protests previously received were noted in the record. After the completion of the Respondent's evidence at the last mentioned hearing, a motion was made on its behalf for an interim rate increase, pending examination of Respondent's books and records by the Commission's staff. By order of March 26, 1953, the Commission authorized Respondent to put into effect as of April 1, 1953, temporary rates designed to increase its annual revenues by approximately $183,099, which rates were put into effect upon the condition that should the Commission, in its final determination in this proceeding, find said interim rates to be excessive, refunds would be made by Amere to its customers as directed by the Commission. The Commission's staff made an examination of Amere's books and records, and at a hearing held herein on May 11, 1953, the results of this examination were introduced by the Commission's accountant, George Heath, along with other evidence on behalf of the Respondent and protestants. A final hearing was held on June 2, 1953, and this case was submitted for decision. On June 3, 1953, an order was entered further suspending the proposed increased rates until December 10, 1953, unless otherwise ordered by the Commission. Short briefs were filed on behalf of the various parties, the last of which was received on July 6, 1953.

History, Corporate Structure, Territory, and Growth of Amere

The predecessor of Amere, Beckley Gas Company, was organized in 1929. In 1930 the entire stock of the company was acquired by Columbia Gas & Electric Corporation (now The Columbia Gas System, Inc., hereinafter referred to as "Columbia"). In 1931 Atlantic Seaboard Corporation, hereinafter called "Atlantic," a subsidiary of Columbia, acquired from Columbia all of the capital stock of Amere, and Respondent remains a subsidiary of Atlantic, although negotiations are under way to make Amere a direct subsidiary of Columbia.

After the establishment of gas service in Beckley, the cities of Lewisburg, Ronceverte, White Sulphur Springs, Princeton, and Athens were added to the Respondent's system in the years 1931 and 1932 as a result of the construction by Atlantic of a 20-inch gas line from Boldman, Kentucky, to the eastern seaboard, which passed through the vicinity of these communities. Service to Mullens, Wyoming County, was begun by Amere in 1939. Altogether, as of December 31, 1952, Amere had 15,102 customers located in the following communities: Beckley, 7,246; Princeton, 2,478; Mullens, 992; Lewisburg, 940; White Sulphur Springs, 849; Mabscott, 634; Sophia, 632; Ronceverte, 573; Athens, 255; Lester, 122; and 381 rural customers. Of these customers, 13,505 are residential, 1,488 are commercial, 87 are municipal and public, and 22 are industrial. The system is divided into three distinct sections, namely, the Beckley-Mullens area, the Princeton-Athens area, and the Lewisburg-White Sulphur Springs area, and these sections are not interconnected by lines of Amere, but they are connected by the aforementioned 20-inch line of Atlantic.

Amere has had a constant and rapid growth, both in customers served and gas sold, as is illustrated by the fact that in 1931 it had an average of 1,102 customers using an average of 102 Mcf of gas annually, resulting in total annual sales of 112,580 Mcf, as compared to an average of 14,370 customers using an average of 203 Mcf annually, resulting in total annual sales of 2,926,036 Mcf in 1952. Amere originally purchased its entire gas supply from Ravencliff Development Company, hereinafter called "Ravencliff," which gas was used in furnishing service in Beckley, and this company is still the largest local supplier of gas to Amere. As heretofore noted, it was not until Atlantic constructed its 20-inch line that gas was made available to the Princeton-Athens area and the Lewisburg-White Sulphur Springs area, and no local gas has ever gone directly to these last mentioned areas, as the distribution system serving these areas is connected directly to Atlantic's line.

Amere also delivers gas to Bluefield Gas Company, which gas is originally furnished by Atlantic to Amere and transported through the latter's lines to a point near Princeton

where it is taken by Bluefield Gas Company. Amere is paid a transportation charge for handling this gas. The rates to Bluefield Gas Company are under the jurisdiction of the Federal Power Commission and are not involved in this proceeding.

Gas Supplies and Purchases

As hereinbefore noted, Ravenscliffs was the original local supplier of gas to Amere for the Beckley area. During the year 1952, Amere purchased from Ravenscliffs 887,476 Mcf of gas and from other local suppliers the following amounts: Columbian Carbon Company, 647,406 Mcf; Hope Natural Gas Company, 92,886 Mcf; Owens-Libby-Owens Gas Department, 16,053 Mcf; and Ragland & Blackshear, 3,188 Mcf. These local purchases of gas total 1,647,009 Mcf for 1952. During the same period Amere received 1,473,090 Mcf from Atlantic, and exchanged 105,321 Mcf with Atlantic, making a net purchase from this source of 1,367,769 Mcf, and total purchases from all sources of 3,014,778 Mcf. For the purposes of this proceeding the calendar year 1952 has been adopted as the test period by the Respondent and accepted by the Commission.

Under an agreement with Atlantic, Amere delivers to Atlantic any surplus gas it has purchased from local producers, and at a later date Atlantic returns this gas to Amere. This procedure accounts for the 105,321 Mcf mentioned in the above paragraph. However, gas purchased from Columbian Carbon Company, hereinafter called "Carbon," is not included in this exchange agreement. There is a contract between Carbon, on the one hand, and Amere and Atlantic, on the other, which provides that Amere may take all of the gas it can use from Carbon's available supplies and that Atlantic will take all of the surplus. Carbon furnishes this gas at 24¢ per Mcf during the months of January, February, March, April, November, and December, and at 22.5¢ per Mcf for the remaining six months. It is the contention of the Commission's staff and of the protestants that there is no reason for treating the gas purchased from Carbon differently from that purchased from other local producers and that all of the Carbon gas should be sold to Amere, and that that portion delivered by

Amere to Atlantic should be returned by Atlantic to Amere as exchange gas. This would result in a substantial saving to Amere because Amere is now required to pay approximately 62¢ per Mcf for all gas purchased from Atlantic; whereas, as heretofore noted, the purchases from Carbon range from 22.5¢ to 24¢ per Mcf. It is further contended that this gas purchased from Carbon is transported through Amere's lines for a distance of 27 miles before being delivered to Atlantic's line, and that no charge is made to Atlantic for this transportation. In reply to this contention, the Respondent points to the contract with Carbon, to which Atlantic is a party, and contends that Carbon would not have entered into a contract with Amere alone. The Commission is not impressed with the contention of the Respondent that Carbon would not have entered into a contract with Amere individually. Amere is a subsidiary of Atlantic, and any contractual obligations undertaken by Amere are substantially guaranteed by its parent company. This contract has never been filed with or approved by this Commission. Further, Hope Natural Gas Company, one of the largest gas utilities in this state, entered into a contract with Amere alone. The Commission is not advised of the reasons of the Respondent or of its parent company for handling the purchases from Carbon as they do, but whatever their reasons may be, no justification has been shown in this proceeding for such method of operation; and as this manner of handling the gas is obviously detrimental to Amere's West Virginia customers, the Commission will treat all of the gas delivered by Carbon as being to the account of Amere, and that portion of the Carbon gas taken by Atlantic to be on an exchange basis with Amere the same as the other locally produced gas.

Staff Exhibit No. 1, page 2, shows Atlantic purchased from Carbon 627,476 Mcf of gas at 14.73 pound pressure base during 1952. As the Commission deems that this gas should have been purchased by Amere and exchanged with Atlantic the same as the 105,321 Mcf purchased by Amere from other local producers, Amere's net purchases from Atlantic, excluding purchases for Bluefield Gas Company, for the test period should be reduced from 1,195,530 Mcf to 568,054 Mcf.

As to this remaining 568,054 Mcf of gas purchased from Atlantic by Amere at an average of 62¢ per Mcf under a contract on file with the Federal Power Commission, Heath has treated this gas as being properly subject to an exchange contract between the two companies, and under this hypothetical exchange agreement has charged Amere 40¢ per Mcf. This method, including the adjustment of the Carbon gas, results in a saving of $358,807 to Amere for the test period. In support of this method of handling sales between the two companies, Heath points out that in a recent rate proceeding before this Commission the evidence showed that Cumberland and Allegheny Gas Company and The Manufacturers Light and Heat Company, both Columbia subsidiary companies operating in the northern portion of West Virginia and in Pennsylvania and Maryland, are exchanging gas under a similar agreement. The agreement between the two last mentioned companies is on file with the Federal Power Commission, as is the agreement between Atlantic and Amere, and gas is exchanged at 37¢ per Mcf. During the twelve-month period ended May 31, 1952, Cumberland delivered to Manufacturers 1,772,826 Mcf and Manufacturers delivered to Cumberland 711,954 Mcf, resulting in Manufacturers receiving a net of more than one million Mcf under the exchange agreement. Heath states that there is no reason why Amere should not benefit from such an exchange agreement with Atlantic in the same manner that Manufacturers benefits under its agreement with Cumberland, and that in his opinion 40¢ per Mcf is more than the cost of the service to Atlantic. To illustrate the inequities of the price Amere is required to pay Atlantic for gas, Heath also notes Amere's location with reference to the source of supply of gas. Flat Top, the point where Amere takes a large amount of gas from Atlantic, is 91.2 miles from Boldman, Kentucky, the beginning point of Atlantic's 20-inch line, and Washington, D. C., is 257.7 miles beyond Flat Top; yet Atlantic supplies gas to Washington, D. C., at only one cent more commodity charge and only ten cents more demand charge than it does to Amere at Flat Top. Obviously, the Federal Power Commission approved rates of Atlantic give only token consideration to the fact that Atlantic's West Virginia and

Kentucky customers are much nearer to the source of supply than its Virginia and Maryland customers. As a matter of fact, this works only to the detriment of Amere, a Columbia controlled company, as it is the only customer of Atlantic in West Virginia or Kentucky, and to the benefit of gas distributing companies in Virginia, Maryland, and Washington, D. C., that are not Columbia companies. The record further shows that during the months of June, July, and August, 1952, Amere purchased no gas from Atlantic; yet under the agreement between the two companies on file with the Federal Power Commission, Amere had to pay Atlantic $101,228 as a result of the demand charge.

The Commission is reluctant to accept adjustments that are not based upon actual operation, and if the situation described in the preceding paragraph were the whole story, the Commission might reluctantly feel bound to allow as a proper operating expense of Amere the 62¢ per Mcf it pays Atlantic for the 568,054 Mcf of gas received from Atlantic, after deducting the sales of Carbon to Atlantic. However, a part of this whole picture is the United Fuel Gas Company, hereinafter called "United," the supplier of the great portion of Atlantic's gas. United is also a Columbia subsidiary. In addition to distributing gas at retail in large sections of central and southern West Virginia, it is also the main supplier of gas to the whole Columbia system. United produces and purchases gas locally in West Virginia and Kentucky and also purchases gas from the transmission companies that bring gas from the southwest. All of the gas that goes into Atlantic's 20-inch line at Boldman, Kentucky, is supplied by United and is locally produced and purchased gas. Atlantic pays for this gas, and all other gas it obtains from United, under a Federal Power Commission tariff, and the average price for 1952 was approximately 26.5¢ per Mcf. However, the gas Atlantic delivers to Amere is not necessarily Kentucky gas that has been transported 91.2 miles to Flat Top, but at least a portion of such delivery is gas that Atlantic has transported only 28 miles. This results from an arrangement whereby United has gas that it produces or purchases in McDowell County transported for it by Godfrey L. Cabot, Inc., to Atlantic's 20-inch line at what is known as Brier Creek delivery point,

located 11 miles west of Mullens. Information Exhibit No. 1, which was introduced in this proceeding at the request of the Commission, shows that this McDowell County gas is delivered to the account of United by Cabot at Meter No. 2063 on Atlantic's line, and Atlantic is billed for same under the last mentioned Federal Power Commission tariff. Under this arrangement Atlantic may then transport this gas, which cost it not more than 26.5¢ per Mcf at Brier Creek (and for which Atlantic paid Cabot only 25¢ prior to September 1, 1952), to Flat Top, a distance of only 28 miles, and deliver it to Amere at 62¢ per Mcf. During the last four months of 1952 United delivered 802,470 Mcf of gas to Atlantic at Brier Creek, which is more gas than Amere purchased from Atlantic for the whole year, after deducting the gas Carbon sold to Atlantic.

In addition to its sales to Atlantic, United sells gas to several other Columbia companies. The territory served by Amere is in close proximity to that served by United. There is no reason why United could not be the direct supplier to Amere. If, in some instances, Atlantic's 20-inch line were required to transport the gas thus sold to Amere, Atlantic could be paid a reasonable transportation charge. This is a practice often followed by gas utilities, including the Columbia companies. Although Amere might not be able to obtain from United a rate as advantageous as the 26.5¢ per Mcf. enjoyed by Atlantic, certainly this method of supplying gas to Amere would result in its paying less than the 40¢ per Mcf allowed by Heath in his computation of operating expenses. Considering all of the aforementioned factors, the Commission finds that said 40¢ per Mcf. rate Heath has used is fair and equitable, and it will be adopted for the purposes of this proceeding.

As before mentioned, Columbia contemplates purchasing the stock of Amere from Atlantic, thus making Amere a direct subsidiary of Columbia. As Amere is located within the general territory of United, which is a much larger utility, it would seem feasible to merge the properties of Amere with United and thus solve the problems that arise from intercompany sales. If this merger were consummated, United would then pay Atlantic a transportation charge for any use made of its 20-inch line, and Federal

Power Commission commodity and demand rates would not be involved. United and Amere now have the same executive officers and the same home office, and the corporate records are kept at the same location. The Commission hopes that under these circumstances Columbia will reconsider its decision to make Amere a direct subsidiary and, instead, merge the Amere properties with United. In this manner the present customers of Amere would receive the benefit of being part of United, to which they are entitled, instead of the burden that is now imposed upon them as a result of the present corporate setup.

Operating Expenses

Operating expenses for the year ending December 31, 1952, were shown by the Respondent's books to be $1,425,626. Due to changes that occurred during the year, it is necessary to make certain adjustments in these amounts to arrive at a going level of operating and maintenance expenses as of December 31, 1952. These adjustments include increases in labor costs, increases in cost of gas purchased from local producers, as well as from Atlantic, and small adjustments in certain other items, which result in adjusted operating and maintenance expenses of $1,523,951 according to Amere's exhibits. Heath, in his exhibit, agrees substantially with the position of the Respondent except as to gas purchased from Atlantic by Amere, discussed at length in the preceding section. For the reasons stated therein, Heath's adjustments as to the cost of gas, and other minor adjustments shown in his exhibit, are accepted by the Commission for the purposes of this proceeding. This results in adjusted operating expenses of $1,168,031 for the test period, which is $355,920 less than claimed by Amere.

Rate Base

The Respondent's rate base, as set forth in its exhibits, is based upon original cost of the property. This rate base was arrived at by taking the total gas plant in service as of December 31, 1951, which amounted to $3,149,453, and the total as of December 31, 1952, which amounted to $3,604,099, and averaging these two amounts results in an average

gas plant in service of $3,376,776. This method of arriving at the value of the gas plant in service is the same as that used by the Commission in recent years in all of the rate proceedings before it involving major utilities. It is also the same method followed by the Federal Power Commission and a great majority of state regulatory agencies. The use of this method at the present time results in placing a lesser value on the utility's property than would be arrived at if a reproduction new or fair value rate base were established, but the Commission believes the original cost rate base to be the fairest means of valuing a utility's property and not subject to the constant variations inherent in the reproduction new method, which variations may from time to time, depending on current economic conditions, unduly favor either the utility or the consumer.

The rate base presented by the Respondent and that presented by the Commission's accountant, Heath, are nearly the same, Heath's rate base being slightly higher than claimed by the Respondent. For the purposes of this proceeding, the Commission adopts the Heath rate base, as follows:

Gas plant in service	$3,376,776
Construction work in progress	143,127
Retirement work in progress	3,225
Total	$3,523,128
Less:	
Reserve for depreciation and amortization	491,946
Contributions in aid of construction	7,030
Total Net Investment	$3,024,152
Add:	
Cash working capital (⅛ of operating and maintenance expenses less cost of gas)	56,098
Materials and supplies	124,834
Prepaid accounts	5,725
Average Net Original Cost Rate Base	$3,210,809

Authorized Rates

In the Commission's order of March 26, 1953, in which it authorized Amere to put into effect interim increased rates as of April 1, 1953, the statement was made that higher rates were authorized in the Lewisburg-White Sulphur Springs and Princeton-Athens areas than in the Beckley-Mullens area because from the beginning of the company the Beckley-Mullens area had enjoyed a much lower rate due primarily to the availability of locally produced gas. The Lewisburg-White Sulphur Springs area and the Princeton-Athens area have always been supplied gas from Atlantic's 20-inch line. The interim rates heretofore mentioned increased gas in the Beckley-Mullens area to a greater extent percentagewise than in the other areas because the evidence in this proceeding indicated that even in that area gas was required from the Atlantic line on 170 days during 1952, and evidence later introduced by Heath substantiates this by showing that Beckley uses 28.19% of the gas Amere purchases from Atlantic. Under these circumstances the Commission believes that the differential between the rates in the various areas, as established in its order of March 26, 1953, is as equitable an adjustment as can be made, and no change will be made therein.

For the reasons hereinbefore stated, the Commission has determined to accept the operating and maintenance expenses as set forth in the Heath exhibit on Schedule No. 13 in the amount of $1,448,977, adjusted so as to reflect the interim rate increase. The annual gross revenue produced by said interim rates has been determined to be $1,650,402, which indicates an expected net operating revenue of $201,425. In earning such net revenue, the Respondent will have a return of 6.27% on its average net original cost rate base of $3,210,809, as established under the heading "Rate Base." For a gas utility of this type and size, the Commission determines that 6.27% is a fair return, and, therefore, no changes will be made in the interim rates heretofore established, and said rates will be made permanent.

An order will be entered in accordance with the findings herein.

JAN 18 1954
HAROLD B. WILLEY, C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 540

AMERE GAS UTILITIES COMPANY,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF WEST VIRGINIA

APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

JOHN C. FOX,
Attorney General of West Virginia;
STANLEY C. HIGGINS, JR.,
CHAS. E. MAHAN,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 540

AMERE GAS UTILITIES COMPANY,
Appellant,

vs.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Comes now appellee and files its statement in opposition to appellant's statement as to jurisdiction and hereby moves the Court to dismiss the appeal herein or affirm the decision and judgment of the Supreme Court of Appeals of the State of West Virginia, from which decision and judgment said appeal is taken.

I. Brief Statement of Facts

Appellant, Amere, distributes gas at retail in southern West Virginia to 15,102 customers, as of December 31, 1952 and is subject to the jurisdiction of the appellee, Public Service Commission of West Virginia. Amere is located

within a large gas producing area and purchases about two-thirds of its annual gas requirements from local producers at an average cost of 22c per Mcf, or less. About one-third of its requirements are purchased from its parent company, Atlantic Seaboard Corporation, under a two-part tariff approved by the Federal Power Commission, averaging 60.47c per Mcf. In the test period, Amere paid to Atlantic demand charges in June, July and August of $101,228.00, for which it took no gas. Atlantic owns all of the stock of Amere, although Columbia Gas System, Inc., the holding company, now has an application pending with the Securities and Exchange Commission to acquire this stock from Atlantic (Tr. 18). Atlantic is an interstate pipe line carrier of gas and sells under a Kentucky-West Virginia filed tariff, under which Amere is the only customer in Kentucky and West Virginia. Practically all of Atlantic's gas is purchased from United Fuel Gas Company, another Columbia System affiliate, at an average Mcf price of 26.5¢. A large part of the gas which United sells to Atlantic is produced locally in West Virginia and delivered by the lines of the producer to Atlantic, a distance of 28 miles from its principal point of delivery to Amere, at a delivered cost of approximately 20¢ per Mcf (Tr. 224-228). United is a large producer, purchaser, storer and local distributor of gas in West Virginia, supplying most of the gas requirements for the entire Columbia Gas System. The System comprises some 14 affiliates and subsidiaries, inclusive of Atlantic, United and Amere, with principal offices in New York, and common officers and management at Charleston (Ex. 8). Some of these affiliates exchange and transmit gas to each other, either free of charge or under exchange agreements, at contract rates (Tr. 242-244-299).

Atlantic and Amere transmit gas for each other, free of charge, for considerable distances. They also have a con-

tract filed with the Federal Power Commission whereby a large volume of Amere purchased gas from local producers is furnished to Atlantic when not needed by Amere and when needed by Amere, Atlantic returns an equal volume, both without charge (Tr. 33-49-98). Amere and Atlantic also purchase under joint contract, large quantities of locally produced gas from Columbian Carbon Company at an average price of about 23¢, but without exchange provisions (Tr. 32-104-185).

Based on evidence of record, principally of its Assistant Chief Accountant Heath and Staff Exhibit No. 1 (Tr. 289, et seq. and 355, et seq.), the Commission made an initial determination that the methods and practices of Amere and its affiliates, to their mutual profit and advantage, were wasteful, extravagant and unnecessary and cast an unnecessary cost upon Amere's rate payers.

The Commission by its interim order, filed as Appendix A with this Statement and by the testimony of Heath, proposed that Amere need not purchase any gas from Atlantic at the high cost established, but that it could and should exchange the Columbian Carbon gas with Atlantic on the same basis that they were exchanging other locally produced gas and that the remainder of Amere's requirements which had theretofore been purchased from Atlantic should be supplied by United at a cost of 40c per Mcf, which was found from the record to be reasonable and compatible with other practices within the System. No good and tenable reasons appear from the record why such adjustments and changes could not and should not be made.

The Commission then called another hearing to give Amere the opportunity to rebut the Staff testimony or to show, if it could, why it should not comply with the Commission's proposals (Tr. 327). This Amere could not or did not do, apparently contenting itself with reliance upon the

current Federal Power Commission established rate and the costs paid to Atlantic.

Several months later, the Commission by its final report and order, filed as Exhibits A and B with appellant's Statement, found that to the extent that the Columbian Carbon gas was not exchanged between Amere and Atlantic and to the extent that Amere's price for the remaining gas purchased from Atlantic at 60.47¢ exceeded the 40¢ found by the Commission, the operating costs of Amere for purchased gas during the test period, were excessive and unnecessary, in the amount of $358,807.00, and to that extent, the proposed increases of Amere were unreasonable.

Upon these bases, the Commission found a return of 6.27% upon an uncontested rate base of approximately $3,200,000.00.

II. The Commerce Clause of the Federal Constitution Is Not Involved Herein

(a) The action of the Commission did not purport to deny or usurp the jurisdiction of the Federal Power Commission to approve the tariffs of Atlantic under which it sold and exchanged gas to and with Amere during the test period nor did it inquire into or challenge that approval. The Commission's sole determination, based upon substantial evidence, was that it was unjust, unreasonable and unnecessary for Amere to purchase any gas from its parent company, Atlantic, at high costs, when other sources of supply and methods of acquisition were available and practicable at substantially less costs. The Commission denied to Amere the proposed increases, to the extent only that the costs paid exceeded the costs necessary to obtain the required gas. The Commission did not *order* Amere to do anything at all and consequently nothing which would require Federal Power Commission approval. It merely pointed out the

abuses of the affiliated relations and how they might be corrected and that correction must be found or good cause shown by Amere. It was not only within the jurisdiction of the Commission but it was its statutory duty to inquire into the methods and practices of Amere in order to determine the reasonable costs at which Amere could and should acquire gas for distribution to its local customers.

Western Distributing Company v. *Public Service Commission of Kansas*, 285 U. S. 119, 76 L. Ed. 655, is factually analogous to and decisive of many of the questions involved in the instant case. A general statement therefrom is quoted:

> "Having in mind the affiliation of buyer and seller and the unity of control thus engendered, we think the position of the appellees is sound, and that the court below was right in holding that if appellant desired an increase of rates it was bound to offer satisfactory evidence with respect to all the costs which entered into the ascertainment of a reasonable rate. Those in control of the situation have combined the interstate carriage of the commodity with its local distribution in what is in practical effect one organization. There is an absence of arm's length bargaining between the two corporate entities involved, and of all the elements which ordinarily go to fix market value. The opportunity exists for one member of the combination to charge the other an unreasonable rate for the gas furnished and thus to make such unfair charge in part the basis of the retail rate. The state authority whose powers are invoked to fix a reasonable rate is certainly entitled to be informed whether advantage has been taken of the situation to put an unreasonable burden upon the distributing company, and the mere fact that the charge is made for an interstate service does not constrain the Commission to desist from all inquiry as to its fairness. Any other rule would make possible the gravest injustice, and would tie the hands of the state authority in such fashion that it could not

effectively regulate the intrastate service which unquestionably lies within its jurisdiction."

State Corporation Commission of Kansas v. *Wichita Gas Company*, 290 U. S. 561, 78 L. Ed. 500;

Dayton Power & Light Company v. *Public Utilities Commission of Ohio*, 292 U. S. 290, 78 L. Ed. 1267;

West Ohio Gas Company v. *Public Utilities Commission of Ohio*, 294 U. S. 63, 79 L. Ed. 761;

Federal Power Commission v. *Hope Natural Gas Company*, 320 U. S. 591, 88 L. Ed. 333;

Panhandle Eastern Pipeline Company v. *Public Service Commission*, 332 U. S. 507, 92 L. Ed. 128;

Lone Star Gas Company v. *Texas*, 304 U. S. 224, 82 L. Ed. 1304;

Public Utilities Commission v. *Landon*, 249 U. S. 235, 63 L. Ed. 577;

United Fuel Gas Company v. *Public Service Commission of West Virginia*, 95 W. Va. 415, 121 S. E. 281.

(b) In dealing with Amere's gas requirements, the Commission purported to act only with respect to locally produced gas, which it had the right to do. The Commission's recommendations, if followed by Amere, would not divert or interfere with the flow of gas in interstate commerce but would relieve and increase it.

People's Natural Gas Company v. *Public Service Commission of Pennsylvania*, 270 U. S. 550, 70 L. Ed. 726;

Manufacturers Light & Heat Company v. *Ott, et al.*, 215 Fed. 940, 242 U. S. 664, 61 L. Ed. 551.

III. The Appellant, Amere, Was Accorded Due Process of Law, Procedurally and in Substance

(a) The appellant had its day in Court. The Appellee Commission by its interim order and by the testimony and

exhibit of its staff gave full and timely notice of the Commission's proposed action and also gave adequate time and opportunity for Amere either to comply or rebut. Amere failed or refused to do either, contenting itself to rely upon the Federal Power Commission approved charges and the payment thereof. To the extent that it failed and refused, the relief sought was properly denied.

West Ohio Gas Company v. *Public Utilities Commission of Ohio*, 294 U. S. 63, 79 L. Ed. 761;

Dayton Power & Light Company v. *Public Utilities Commission of Ohio*, 292 U. S. 290, 78 L. Ed. 1267;

United Gas Public Service Company v. *State of Texas*, 303 U. S. 123, 82 L. Ed. 702;

Public Utilities Commission v. *Pollak*, 343 U. S. 451, 96 L. Ed. 1068.

(b) The action of the Commission was not arbitrary. The statutes and decisions of West Virginia charged the Commission with the duty of investigating the methods and practices of Amere in order to determine just and reasonable rates. A public utility will not be permitted to include negligent or wasteful losses among its operating charges, for the purpose of fixing rates. Evidence and exhibits of these methods and practices were developed of record adequate for the Commission's findings and to throw upon Amere the burden of proving the reasonableness of its costs and practices, which burden it failed and refused to assume and discharge.

West Virginia Code, ch. 24-2-2 and 7;

Baltimore & Ohio Railway Company v. *Public Service Commission of West Virginia*, 81 W. Va. 457, 94 S. E. 545;

City of Charleston v. *Public Service Commission of West Virginia*, 95 W. Va. 91, 120 S. E. 398;

State Corporation Commission of Kansas v. *Wichita Gas Company*, 290 U. S. 561, 78 L. Ed. 500;
Western Distributing Company v. *Public Service Commission of Kansas*, 285 U. S. 119, 76 L. Ed. 655;
West Ohio Gas Company v. *Public Utilities Commission of Ohio*, 294 U. S. 63, 79 L. Ed. 761;
Columbus Gas & Fuel Company v. *Public Utilities Commission of Ohio*, 292 U. S. 397, 78 L. Ed. 1327;
American Toll Bridge Company v. *Railroad Commission*, 307 U. S. 486, 83 L. Ed. 1414.

(c) The burden of proof was upon Amere. In transactions between affiliates, the burden of proving reasonableness rests heavily upon the utility, by clear and convincing evidence. Not only must it prove that the expenses were reasonably incurred but also that the cost thereof was reasonable. This, it failed and refused to do.

West Virginia Code, Ch. 24-2-4;
City of Charleston v. *Public Service Commission of West Virginia*, *supra*, Syl. 5, 7 and 8;
Dayton Power & Light Company v. *Public Utilities Commission of Ohio*, 292 U. S. 290, 78 L. Ed. 1267;
Los Angeles Gas & Electric Corporation v. *Railroad Commission*, 289 U. S. 287, 77 L. Ed. 1180, 1191;
United Gas Public Service Company v. *State of Texas*, 303 U. S. 123, 82 L. Ed. 702;
Western Distributing Company v. *Public Service Commission of Kansas*, 285 U. S. 119, 76 L. Ed. 655;
In re: Home Gas Company, 2 FPC 402;
New York State Natural Gas Corporation, 3 FPC 734.

(d) The ruling of the Commission was not confiscatory. Based upon evidence which Amere did not rebut, the Commission found a return of 6.27% upon an uncontested rate base of approximately $3,200,000.00.

United Gas Public Service Company v. *State of Texas*, 303 U. S. 123, 82 L. Ed. 702;

West Ohio Gas Company v. *Public Utilities Commission of Ohio*, 294 U. S. 63, 79 L. Ed. 761;
Railroad Commission v. *Pacific Gas Electric Company*, 302 U. S. 388, 82 L. Ed. 319.
Los Angeles Gas & Electric Corporation v. *Railroad Commission*, 289 U. S. 287, 77 L. Ed. 1180.
West v. *Chesapeake & Potomac Telephone Company*, 295 U. S. 662, 79 L. Ed. 1640.

It is, therefore, submitted that the jurisdiction of the Federal Power Commission has not been invaded, that the flow of gas in interstate commerce has not been obstructed or interfered with, that the Commission's findings were not arbitrary but were based on evidence, that the appellant has been given a fair hearing and has failed to carry the burden of proving confiscation by clear and convincing evidence and has failed to overcome the legal presumption of the validity and correctness of the order herein involved, and, this being true, has failed to show the existence of a substantial federal question in this regard.

Appellee contends that the record in this case discloses no substantial federal question and, therefore this Court is without jurisdiction of this cause. It is, therefore, submitted that appellee's motion herein to dismiss the appeal or affirm the judgment of the Supreme Court of Appeals of West Virginia should be granted.

WHEREFORE, appellee prays that this Court refuse to note jurisdiction in this cause and that appellee's motion to dismiss the appeal or affirm the judgment be granted.

JOHN C. FOX,
Attorney General, State of West Virginia;
STANLEY C. HIGGINS, JR.,
CHAS. E. MAHAN,
Attorneys for Appellee.

Dated: December 28, 1953.

APPENDIX "A"

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA—CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA, at the Capitol in the City of Charleston on the 26th day of March, A. D., 1953.

Case No. 3888

AMERE GAS UTILITIES COMPANY, a Corporation

Investigation and Suspension of Rates and Charges

Application for a Temporary Rate Increase

This proceeding came on to be heard this 26th day of March, 1953, upon the revised tariff sheets offered for filing by Amere Gas Utilities Company, a corporation, hereinafter called "Respondent" or "Amere", designated Third Revision of Original Sheet No. 8 to its Tariff P. S. C. W. Va. No. 2 and Second Revision of Original Sheet No. 8-A to said tariff, which said new revision cancel Second Revision and First Revision, respectively, of said sheets in said tariff and state increased rates and charges for furnishing natural gas service to its customers in West Virginia except sales to Bluefield Gas Company, all offered for filing on January 6, 1953, to become effective February 15, 1953; upon the order of the Commission entered herein on January 8, 1953, setting said matter down for hearing and suspending the use of the rates and charges stated in said revised sheets until June 10, 1953, unless otherwise ordered by the Commission; upon proof of the giving of notice as required by said order of January 8, 1953; upon the protest of the cities of Beckley, Princeton, and Mullens, the Town of Sophia, Independent Citizens' Committee of Beckley, and the Chamber of Commerce of Mullens, all represented by counsel, and numerous written protests; upon the evidence adduced at a hearing held herein on February 24, 1953; upon Respondent's motion that it be granted a temporary rate increase pending final hearing and determina-

tion in this matter; and upon the oral argument of counsel and memorandum regarding said motion.

From all of which it appears that the Respondent furnishes natural gas at retail to customers in the counties of Raleigh, Wyoming, Summers, Mercer, and Greenbrier; that at present Respondent has one rate applicable to service rendered in Raleigh and Wyoming counties and a somewhat higher rate for service rendered in the other counties; that Respondent's proposed rates are substantially the same for the entire area it serves in West Virginia, as it now contends that there is no justification for the two different rates due to the fact that a portion of the gas supplied in both areas is obained from the Southwest, and the gas purchased locally in the Beckley-Mullens area is used throughout the system; that Respondent's proposed rates would increase its annual revenues $500,462 on the basis of its 1952 sales; that for the year 1952 Respondent claims its operation resulted in an actual deficit of $23,000; that with adjustments for presently effective increases in costs of operation, this deficit will be $218,337 for the year 1953; and that the original cost of Respondent's gas plant, less its reserve for depreciation, is $3,209,418 based upon the average of the plant in service as of December 31, 1951, and December 31, 1952.

Respondent contends that during the past two years it has experienced major increases in costs of operation as follows: (1) rate increase granted Atlantic Seaboard Corporation on March 7, 1952, which amounts to $106,400 based upon Respondent's 1952 purchases from Atlantic, and rate increase of $103,900 granted Atlantic based upon the same period, effective February 15, 1953; (2) increased prices paid Columbian Carbon Company and other local producers amounting to $23,200 based upon the year 1952; (3) increased wages during 1951 and 1952 amounting to $38,100 on an annual basis; and (4) increases in gross sales tax in the amount of approximately $9,500 based upon 1952 experience. The total of the above increases is $281,100, and the Respondent is requesting $281,000 additional revenue on an interim basis in order that it may not suffer irreparable loss pending examination of its accounting books and records by the Commission's staff and representatives of the pro-

testants and further hearing before final decision in this matter.

In an application for interim rates, the Commission construes all questions pertaining to an increase in rates, about which there may be reasonable doubt, against the utility for the reason that neither the Commission nor the protestants have had any opportunity to refute the evidence offered by the utility. In this proceeding it appears that there is reasonable doubt as to Respondent's contentions regarding the following matters.

1. Amere makes no charge to Atlantic Seaboard for the transportation of gas through the facilities of Amere from Wingrove Compressor Station to Flat Top, a distance of 27.18 miles. It may be said that Atlantic Seaboard, in turn, transports gas through its facilities for Amere, but not to the same extent.

2. During the months of June, July, and August, Amere did not actually purchase any gas from Atlantic Seaboard but still was required to pay a demand charge for this period amounting to $101,228.

3. The fact that Amere and Atlantic Seaboard are affiliates results in Amere not being able to purchase all of the gas sold by Columbian Carbon Company.

4. There is no exchange agreement between Amere and Atlantic Seaboard for all of the gas that flows between the two companies. Cumberland and Allegheny Gas Company and Manufacturers Light & Heat Company, which are two other gas utilities operating in the state of West Virginia owned by The Columbia Gas System, Inc., provided for the exchange of gas at 37¢ per MCF. If such a procedure were followed in this case, it would result in substantial savings in the cost of gas to Amere. For the purposes of this interim rate application, the Commission will treat the flow of gas between Amere and Atlantic Seaboard on the basis of an exchange at 40¢ per MCF.

In arriving at adjusted cost of gas purchased from Atlantic Seaboard by Amere for the year 1952, excluding pur-

chases made for Bluefield Gas Company, the Commission adopts the following tabulation:

Company adjusted cost at "going level" (1,194,362 MCF at average rate 60.51¢ per MCF)	$722,752
Less:	
Amere purchase of Columbian gas available to Seaboard—at "going level" (604,678 MCF at average rate 22.71¢ per MCF)	$137,310
Net exchange received from Seaboard (589,684 MCF at 40¢ per MCF)	235,874
Adjusted cost of gas purchased from Seaboard	$373,184
Potential saving to Amere	$349,568

Allowing for the above adjustments, it appears that if the gas rate increases set forth in (1) above are permitted to be made permanent by the Federal Power Commission, the Respondent will require at least $183,099 increased revenue annually, and the rates hereinafter authorized on an interim basis are designed to produce approximately this amount. Respondent stated at said hearing that it was willing to collect said interim rates with the understanding that in the event the Commission determines in its final order in this proceeding that said rates are not justified, it will make such refunds as may be required by the Commission. The Commission, in making the deductions from Respondent's claimed operating expenses hereinbefore set forth, does not mean to pass finally upon these matters, and these findings are made only for the purpose of determining interim rates.

The interim rates hereinafter authorized increase the rates percentagewise in the Beckley-Mullens area to a greater extent that in the Lewisburg-Princeton area because the rates in the former area are now much lower than those in the latter. At this time the Commission is not in a position to find that the rates in all areas served by the

Respondent in West Virginia should be the same, but the evidence adduced thus far in this proceeding indicates that the wide differential in the present rates between the areas is not justified.

Upon consideration of the foregoing the Commission is of opinion and finds the Respondent should be granted the interim rates hereinafter set forth, effective for all gas furnished by it in West Virginia on and after April 1, 1953, as nearly as can be determined by meter readings taken on and after April 1, 1953.

It is, therefore, ordered that the Respondent, Amere Gas Utilities Company, a corporation, be, and it hereby is, permitted and authorized to file with the Commission revisions to its present tariff stating the following rates and charges for all gas furnished by it in West Virginia, except for gas furnished Bluefield Gas Company at wholesale:

APPLICABILITY

Applicable in Beckley, Mabscott, Lester, and Sophia, Raleigh County, Mullens, Wyoming County, and rural districts in Raleigh and Wyoming counties, West Virginia.

		Rate
First	1,000 cu. ft. or less per month	$1.25 per 1,000 cu. ft.
Next	1,000 cu. ft. per month	.65 per 1,000 cu. ft.
Next	2,000 cu. ft. per month	.55 per 1,000 cu. ft.
Next	96,000 cu. ft. per month	.45 per 1,000 cu. ft.
All over	100,000 cu. ft. per month	.42 per 1,000 cu. ft.

APPLICABILITY

Applicable in Athens, Lewisburg, Princeton, Ronceverte, and White Sulphur Springs, and Rural districts served in Greenbrier, Mercer, and Summers counties.

		Rate
First	1,000 cu. ft. or less per month	$1.25 per 1,000 cu. ft.
Next	1,000 cu. ft. per month	.77 per 1,000 cu. ft.
Next	2,000 cu. ft. per month	.67 per 1,000 cu. ft.
Next	96,000 cu. ft. per month	.61 per 1,000 cu. ft.
All over	100,000 cu. ft. per month	.52 per 1,000 cu. ft.
Minimum Charge		$1.25 per month

All other rates, rules, and regulations contained in said tariff are to remain as at present, and the above rates are to be effective for all gas furnished on and after April 1, 1953, as nearly as can be determined by meter readings taken on and after April 1, 1953.

The aforesaid interim rates are authorized subject to the condition that if the final determination of this case the Commission finds said interim rate increases are not justified, the Respondent will make such refunds to its customers as the Commission may direct.

The aforesaid interim rates are to be effective until further order of the Commission.

It is further ordered that this proceeding be, and it hereby is, continued.

A Copy. Teste:

(S.) M. F. WRIGHT, JR.,
Secretary.

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

AMERE GAS UTILITIES COMPANY,
Appellant,

v.

PUBLIC SERVICE COMMISSION OF
WEST VIRGINIA,
Appellee.

UPON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF FOR APPELLANT OPPOSING MOTION TO DISMISS

This brief is filed pursuant to Rule 7, par. 3, in opposition to the Motion to Dismiss or Affirm.

I. STATEMENT OF THE CASE.

Since the Commission's Statement of Facts is not only incomplete but also considered inaccurate, a brief restatement of the basic facts relevant to jurisdiction follows.

Amere's territory is widely scattered and sparsely settled (Tr. 17, Exhibit No. 1—Map). The company was

formed in 1929 to serve Beckley and environs from purely local production (Tr. 18). When the Atlantic Seaboard 20-inch transmission line from Boldman, Kentucky to Coatesville, Pennsylvania, was constructed, Amere provided service through laterals therefrom to the cities of Lewisburg, Ronceverte and White Sulphur Springs in 1931, to Princeton and Athens in 1932, and to Mullens in 1939 (Tr. 19). Amere has never produced any gas nor does it have interconnected transmission lines between its several service areas.

The Commission incorrectly states that Amere is located "within a large gas-producing area". Only in the Beckley-Mullens area is any gas produced and there in but limited quantities. The remainder of Amere's territory has at all times been wholly dependent upon gas transported in interstate commerce by Atlantic (Tr. 29-31).

Although all of the evidence shows that Amere has provided incentives for additional local production and purchases all of the available local supply, its requirements in the winter months far exceed production (Tr. 30-31). This condition has resulted principally from the tremendous growth in space heating during the past several years (Tr. 25). For example, while the Beckley peak demand was 22 million Mcf in 1952 [the test year], the total local supply furnished only about 5 million or 25 per cent of such requirement (Tr. 194-195). Therefore, it was necessary for Amere to purchase gas from Atlantic on 170 days during the year to meet demand in the Beckley-Mullens area alone (Tr. 31). Accordingly, the service rendered by Atlantic to Amere is of a "stand by" nature and under the Federal Power Commission's two-part rate, a substantial portion of the cost of gas to Amere necessarily consists of demand charges (Tr. 242).

In a determination of Atlantic's demand-commodity

rate, the West Virginia Commission not only intervened before the Federal Power Commission but offered testimony and filed briefs in support of its contention that Amere was entitled to a more favorable rate (Tr. 254, 267, 364). Its theory of rate-making, however, was rejected. In addition, the Federal Power Commission has held that Atlantic is in fact giving preferential treatment to Amere (Tr. 40). Despite the findings of the Federal Power Commission, the sole lawful authority with jurisdiction in the premises, the State Commission now reasserts its position and attempts to do indirectly, by confiscating Amere's property, what it could not do directly.

Again contrary to the facts, the Commission states that "a large part" of the gas which United Fuel Gas Company sells to Atlantic is produced locally in West Virginia and delivered to Atlantic only 28 miles distant from its principal delivery point to Amere (Tr. 99-100 and Information Exhibit No. 1). The Commission knows that United's recent production in McDowell County, together with gas purchased by United from Godfrey L. Cabot, Inc., all of which is transported by Cabot, is less than two per cent of United's deliveries to Atlantic. Practically all of the gas transported through Atlantic's 20-inch line from which service is provided to Amere is purchased from United in Kentucky (Tr. 99-100).

The Commission states that Atlantic and Amere transmit gas for each other "free of charge" under a contract filed with the Federal Power Commission but that the Columbian Carbon Gas, purchased jointly by Amere and Atlantic, is not subject to exchange provisions. This statement is incorrect because the exchange contract, forming a part of both Atlantic's and Amere's Federal Power Commission tariffs, expressly covers the Carbon gas as well as all other locally produced gas; moreover, valuable considerations support the contract (Tr. 34, Appendix I to Exhibit No. 1). Not only has Atlantic

agreed to supply Amere's requirements over and above local production but it also transmits the excess local production in the Beckley-Mullens area to other areas of Amere, and if all such excess cannot there be utilized by Amere, Atlantic takes the same and returns equivalent volumes to Amere when needed in colder weather. Although Amere alone endeavored to purchase the Carbon production, Carbon refused to contract with Amere and insisted upon a year-round market since its gas was being produced under highly competitive conditions (Tr. 96-98, 177, 202). Carbon would have sold its entire production to Hope Natural Gas Company, a much larger utility, had Atlantic not joined in the contract and agreed to take the excess which Amere could not utilize (Tr. 181). It is important to note, however, that Amere has first call on all of the Carbon gas. Amere then transports so much thereof as exceeds its requirements to Atlantic. These purchase and exchange arrangements are mutually advantageous and constitute valuable considerations for the contract which is a part of the Federal Power Commission tariffs of both Amere and Atlantic (Tr. 97-99).

The Commission, at page 3 of its Statement, says that it made "an initial determination" that Amere's practices were "wasteful, extravagant and unnecessary". As the record will plainly disclose: (1) this statement is misleading because the testimony of Heath, its accountant, was offered long after the interim order was made, indicating that if any such "initial determination" was made, the case was pre-judged; and (2) there is no evidence in the record to support such a finding in any event.

Mr. Heath, the only staff witness, did not testify until April 20, 1953. In its interim rate order of March 26, 1953, however [Appendix A to the Commission's Statement], the Commission purported to find that reasonable

doubt existed as to four points. Each related directly to a determination of rates between Atlantic and Amere and their exchange contract filed with the Federal Power Commission. It therefore appears that even prior to the introduction of any evidence by the Commission, it centered its attack upon the Federal Power Commission tariffs.

Mr. Workman, a responsible officer of Amere, unequivocally testified that it is utilizing all available local gas (Tr. 52-53). Mr. Anderson, General Superintendent of Columbian Carbon, a non-affiliated producer, testified that no other local gas is available to Amere which is not now being purchased (Tr. 179). Mr. Stump, Vice-President of Amere in charge of its gas procurement, also stated that all local gas available to Amere is presently being purchased (Tr. 201).

Protestants offered no evidence in this case. The Commission's disallowance of the actual cost of gas purchased by Amere from Atlantic must find support, if any, in the hypothetical opinions advanced by its only witness, Mr. Heath. The Staff Exhibit of which he was sponsor corroborates the Exhibits of Amere since he found Amere's books to be correct (Tr. 322). In addition, Schedule 14 of the Staff Exhibit merely translates into dollars Heath's theory for the disallowance of actual gas purchase costs. Neither the Commission nor protestants made even the slightest attempt to contradict the clear and positive testimony of Workman, Anderson and Stump on behalf of Amere. Mr. Heath candidly admitted that his "opinion" is founded on "theory" (Tr. 300), and that "There is a lot of 'ifs' " (Tr. 369). In fact, his statements reached such speculative proportions that the Commission itself was constrained to inquire:

> "Q Just to clear the record, Mr. Heath, you are an accountant with the Commission?

"A Yes, sir.

"Q And you don't mean to be testifying here today as either a lawyer or as an expert in the fixing of rates?

"A No, sir." (Tr. 374)

II. THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION AND THE NATURAL GAS ACT WERE VIOLATED.

The Commission persists, as it has throughout this case, in disregarding the force and effect of the Natural Gas Act (15 U.S.C. 717-717w). Moreover, the Commission's Statement neither meets the issues nor does it attempt to distinguish or even discuss the pertinent decisions of this Court cited in Amere's Jurisdictional Statement.

An analysis of the twenty-two cases cited and purportedly relied upon by the Commission suggests that not one is either applicable to or decisive of the important jurisdictional questions here involved. With the exception of four of those cases, all were decided prior to the enactment of the Natural Gas Act [June 21, 1938]. The Commission wholly ignored that fact and, moreover, has chosen to close its eyes to the broad regulatory powers intrusted solely to the Federal Power Commission by Congress. *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U. S. 456, 87 L. Ed. 396, 403, 63 S. Ct. 369.

The case of *Western Distributing Company* v. *Public Service Commission of Kansas*, 285 U. S. 119, 76 L. Ed. 655, 52 S. Ct. 283 (1932), upon which the Commission especially relies, convincingly illustrates the fallacy in its contention. There the price paid for gas by the retailer to the producer was fixed by a "verbal contract" between two affiliated companies. The force of the Com-

mission's lengthy quotation from the case is completely dispelled by the significant and distinguishing fact that the price there, unlike the rate Amere is required to pay to Atlantic, was not determined "pursuant to the order or leave of any public authority". The Federal Power Commission, whose jurisdiction over Atlantic is admittedly exclusive, establishes the price that Amere pays for all gas purchased by it from Atlantic. The State Commission now attacks these tariffs as "arbitrary" and "unreasonable" and ignores the many factors, doubtless including its own testimony and briefs, taken into account by the Federal Power Commission in determining the cost of gas at issue. In an effort to escape Federal Power Commission determinations, however, the State Commission hides behind the spectre of "affiliation". Clearly, Atlantic's rates are not fixed at the unfettered will or whim of interrelated companies.

The cited cases of *State Corporation Commission of Kansas* v. *Witchita Gas Company*, 290 U. S. 561, 78 L. Ed. 500, 54 S. Ct. 321 (1934), and *Dayton Power & Light Company* v. *Public Utilities Commission of Ohio*, 292 U. S. 290, 78 L. Ed. 1267, 54 S. Ct. 647 (1934), fall into the same category. There "contract" prices between affiliates, not regulated tariffs, were in issue.

No useful purpose would be served by analyzing each of the many cases cited by the Commission on page 6 of its Statement. None deals with a factual situation where Federal Power Commission tariffs govern the sale of gas in interstate commerce as in the case at bar. Some are inapplicable here because the rates there under attack were fixed by affiliated companies uncontrolled by a regulatory body; others because they antedate the Natural Gas Act. For example, in *Peoples Natural Gas Co.* v. *Public Service Commission*, 270 U. S. 550, 70 L. Ed. 726, 730, 46 S. Ct. 371 (1926), this Court, in the last paragraph of its opinion, expressly declined to consider the very

issue here material. In *Manufacturers' Light & Heat Co.* v. *Ott*, 215 F. 940, 945, (1914), the court observed that if "it be assumed that interstate commerce will be incidentally affected [by the Commission's action], yet the regulation of the local charges of a natural gas company as a public service corporation is within the police power of the state until the Congress sees fit to act." Congress, of course, has now acted; pursuant thereto, the Federal Power Commission has acted. The State Commission now attempts to render, and up to this time has succeeded in rendering, the Federal action of no force or effect. If state commissions can disregard Federal Power Commission tariffs, those tariffs become abortive and meaningless. Research discloses no other attempt by a State to usurp so completely the Federal jurisdiction.

The only determination factually in point which has been found is that of *The East Ohio Gas Co.* v. *City of Cleveland*, 56 P.U.R. (N.S.) 73, 89, where the Ohio Public Utilities Commission held that it was bound to allow as an operating expense the sums actually paid by a distributing company for gas purchased from its affiliate under rates filed with the Federal Power Commission.

III. AMERE WAS DENIED DUE PROCESS OF LAW.

This case presents two issues directly involving the due process clause: (1) confiscation of Amere's property, and (2) an arbitrary finding without supporting evidence constituting a denial of procedural due process.

The Commission's duty of determining just and reasonable rates must be performed in harmony with certain fundamental procedural requirements guaranteed by the Federal Constitution. As stated in *Morgan* v. *United States*, 298 U. S. 468, 80 L. Ed. 1288, 1294, 56 S. Ct. 906:

"* * * There must be a full hearing. There must

> be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & S. R. Co., 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565, supra. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. * * *"

An order based upon a finding made without evidence, or upon a finding made upon evidence which clearly does not support it, is an arbitrary act and a denial of due process against which courts afford relief. *Northern P. R. Co.* v. *Department of Public Works*, 268 U. S. 39, 69 L. Ed. 837, 841, 45 S. Ct. 412; *Chicago, M. & St. P. R. Co.* v. *Public Utilities Com.*, 274 U. S. 344, 71 L. Ed. 1085, 1090, 47 S. Ct. 604; *West* v. *Chesapeake P. Teleph. Co.*, 295 U. S. 662, 79 L. Ed. 1640, 1650, 55 S. Ct. 894; *Washington Gas Light Co.* v. *Baker*, 188 F. 2d 11, 15, cert. denied, 340 U. S. 952, 95 L. Ed. 686, 71 S. Ct. 571.

An order of an administrative body may be set aside for any error of law, whether it be substantive or procedural. *Interstate Commerce Comm.* v. *Union P. R. Co.*, 222 U. S. 541, 56 L. Ed. 308, 311, 32 S. Ct. 108. It may be set aside for lack of findings necessary to support it, or because the evidence was such "that it was impossible for a fair-minded board to come to the result which was reached." *San Diego Land & Town Co.* v. *Jasper*, 189 U. S. 439, 47 L. Ed. 892, 894, 23 S. Ct. 571.

As stated by Mr. Justice Brandeis in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38, 80 L. Ed. 1033, 1053, 56 S. Ct. 720:

> "* * * where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the court will,

> in order to decide the legal question, examine the entire record, including the evidence if necessary * * *."

In the light of the constitutional requirement of due process as construed by this Court in decisions cited in Amere's Jurisdictional Statement and the decisions above, it cannot be gainsaid that this court can and, it is submitted, should take jurisdiction and decide this case because of the Commission's violation of the Fourteenth Amendment in the following respects:

1. The findings of the Commission are wholly without supporting evidence. Mr. Heath's opinion was openly based upon his "conclusions that Amere's customers should receive the benefit of local gas and an exchange agreement should exist between Amere and Atlantic Seaboard, * * *" (Tr. 299).

> (a) Messrs. Workman, Anderson and Stump, by clear and convincing evidence, at no place impeached or contradicted in the record, proved that Amere does purchase all available local gas. Mr. Heath's reference to local gas is predicated upon his and the Commission's contention that the Federal Power Commission failed to give proper weight to the factors which in his opinion should have been considered in fixing Atlantic's rates. Heath stated that "* * * Federal Power is interested in gas over in the East and not West Virginia— * * *" (Tr. 372). The Commission adopted Heath's theory without reservation (Appendix A to Amere's Jurisdictional Statement, pp. 6-7). Heath further testified that "* * * under the Natural Gas Act, all the costs and considerations are not given weight in rate-making." (Tr. 371).
>
> (b) Respecting Mr. Heath's proposed exchange of Columbian Carbon gas, it is important in the first instance to note that such exchange is already cov-

ered by Federal Power Commission tariffs of both Amere and Atlantic. The Commission's tampering therewith is an unlawful invasion of the Federal jurisdiction, as heretofore pointed out. *Illinois Nat. Gas Co.* v. *Central Ill. Pub. Serv. Com.*, 314 U. S. 498, 86 L. Ed. 371, 378, 62 S. Ct. 384. Of equal importance is Mr. Heath's attempt to justify such exchange solely on the basis of another exchange agreement existing between Cumberland and Allegheny Gas Company and the Manufacturers Light and Heat Company affecting the supply of gas in northern West Virginia, Maryland and Pennsylvania. Heath arbitrarily set an exchange price of 40¢ in this case although the Cumberland-Manufacturers exchange price was 37¢ for the stated reason that he "was being liberal with 3 cents" (Tr. 366). The data relative to the Cumberland-Manufacturers exchange was described merely as being in the files of the commission (Tr. 366). The contract itself was not offered in evidence nor was any showing made that the facts and circumstances were even remotely comparable to the instant case. Facts conceivably known to the Commission, but not put in evidence, will not support a rate order. *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 258, 68 L. Ed. 667, 673, 44 S. Ct. 317. Nothing can be treated as evidence which is not introduced as such. *United States* v. *Abilene & S. R. Co.*, 265 U. S. 274, 68 L. Ed. 1016, 1023, 44 S. Ct. 565.

Despite the Commission's assertions at pages 3 and 4 to the effect that Heath's hypothetical exchange arrangement was found "from the record" to be reasonable, these dogmatic claims rest only upon the tenuous utterances of Mr. Heath.

(c) Amere's Exhibit 12 and Mr. Workman's testimony (Tr. 244-256) conclusively demonstrate that

even if the suggested exchange agreement were possible and the Federal Power Commission were to sanction it, the net saving in gas cost to Amere would amount to only $17,000 as contrasted with the Commission's disallowance of $358,807. No attempt was made to contradict or impeach Exhibit 12. Instead the Commission blithely shifted its grounds by suggesting that Amere might purchase gas from United Fuel Gas Company or even merge with it. No supporting cost of service evidence of any kind or character was offered to buttress these postulates. As Mr. Heath admitted, "There is a lot of 'ifs' " (Tr. 369), not the least of which is the jurisdiction of the Federal Power Commission over the transportation by Atlantic of any gas which United might supply to Amere.

2. While admitting that local production is inadequate and that Atlantic is the only other available source, Heath once more ignored the facts by repeatedly asserting that had there been no affiliation between Amere and Atlantic, Amere might have purchased some gas from Hope Natural Gas company at a "lower cost" (Tr. 359-361). Again, admittedly he had made no cost of service study nor investigation of any nature to determine whether Hope might be in a position to sell large quantities of gas on a peak demand standby basis to Amere. Moreover, the uncontradicted testimony of Mr. Workman established that Amere does in fact purchase all of the gas available from Hope (Tr. 33) and that this source represents only 3% of the total purchases Amere made during 1952. (Exhibit A filed with Amere's Jurisdictional Statement, p. 4).

3. The Commission, in attempting to elude the consequences of its arbitrary action, says at page 5 of its Statement that it "did not *order* Amere to do anything at all and consequently nothing which would require Fed-

eral Power Commission approval." Manifestly, this contention is in direct conflict with others appearing in the Commission's Statement to the effect that no good reasons appear why its proposed adjustments and changes should not be made. No euphemism is elastic enough to permit the Commission to escape from the fact that it ordered stricken and cancelled the rates proposed by Amere and that in lieu thereof it placed in effect rates which necessarily result in confiscation. Revenues under the Commission's rates will not even meet current operating expenses exclusive of depreciation and they obviously provide no return whatever on an admitted rate base in excess of $3,200,000.

No matter how the Commission characterizes its actions, the end result of the Commission's order is the taking of property without due process of law, substantively and procedurally. This confiscation was accomplished through the denial of costs incurred pursuant to Federal Power Commission tariffs. Unless reversed, the Commission's order will result not only in Amere's destruction, contrary to constitutional safeguards, but also will inevitably defeat Federal regulation of interstate commerce.

CONCLUSION

For the reasons assigned in Amere's Jurisdictional Statement and in this brief, supported by the authorities therein cited, it is respectfully submitted that this Court can and should exercise jurisdiction to hear this appeal and that the motion of appellee should be denied.

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January 16, 1954.

No. 540. AMERE GAS UTILITIES CO. *v.* PUBLIC SERVICE COMMISSION OF WEST VIRGINIA. Appeal from the Supreme Court of Appeals of West Virginia. *Per Curiam:*

The motion to dismiss is granted and the appeal is dismissed for the want of a substantial federal question. *Charles C. Wise, Jr.* and *Edward S. Pinney* for appellant. *John G. Fox*, Attorney General of West Virginia, for appellee. Reported below: 138 W. Va. —.